

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2144

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be ARGUED By
JOAN P SCANNELL

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RONALD BURGIN a/k/a HASAN JAMAL ABDUL :
MAJID, BILLY SANDPIPER a/k/a MUKHTAR :
ABDUL WALI, :

Plaintiffs-Appellants, :

-against- :

ROBERT J. HENDERSON, Superintendent of :
Auburn Correctional Facility, BENJAMIN :
WARD, Commissioner of New York State :
Department of Correctional Services, :

Defendants-Appellees. :
-----X

BRIEF FOR DEFENDANTS-APPELLEES

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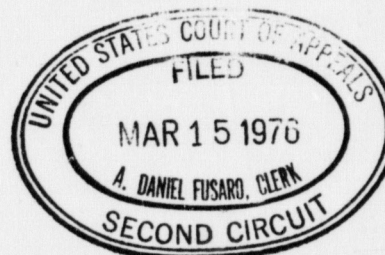


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State Department of Correctional :
Services, :

Defendants-Appellees. :

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BRIEF FOR DEFENDANTS-APPELLEES

Plaintiffs-appellants appeal from a decision of
the United States District Court for the Northern District
of New York (Port, J.) dated July 15, 1975, dismissing
appellants' civil rights complaint.

Question Presented

Did the District Court properly dismiss appellants'
complaint?

Preliminary Statement

Appellants, who are presently inmates at Auburn Correctional Facility, instituted an action in the United States District Court for the Northern District of New York pursuant to 28 U.S.C. §§ 1343, 2201 and 42 U.S.C. § 1983 for alleged deprivation of their civil rights. Appellants also sought to bring this action on behalf of all those similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. Appellants claim that defendants-appellees (hereinafter defendants) have interfered with their free exercise of religion in that appellants are not permitted to wear beards or prayer caps nor pray in a certain fashion. Appellants, who allegedly are Sunni (Orthodox) Muslims of the Islamic Religion, claim that their religion requires that they wear beards and prayer caps and pray five times daily. The prayers allegedly must be performed at certain times: early morning, afternoon, later afternoon, early evening and late evening, and in a prescribed manner; standing, bowing and prostrating.

Appellants requested declaratory and injunctive relief against the prohibition of beards and hats and the

alleged hinderance of the full performance of the prayer duties. Appellants also sought monetary damages.

The District Court (Port, J.) without requiring a response from the defendants, dismissed the complaint. The Court based its decision on the grounds that state regulations in regard to beards and their prohibition had been declared constitutional. As to the other claims involving interference with the practice of the Muslim religion, the Court stated that the Department of Correction had established rules and regulations to ensure that Muslims have the same rights as other religious denominations. Moreover, the Court stated that the regulations were reasonable, allowed for freedom of religious observance and participation, and were consistent with the needs of a maximum security penal institution.

ARGUMENT

THE DISTRICT COURT PROPERLY
DISMISSED APPELLANTS' COMPLAINT.

The dismissal of appellants' complaint by the District Court was proper and should be upheld. The law is clear that the First Amendment right to free exercise of religion is not an absolute one but subject to reasonable

limitations. As the Supreme Court stated in Poulos v. New Hampshire, 345 U.S. 395 (1952):

"The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather round him at any public place at any time a group for discussion or instruction. It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. The Court has never so held but indeed has definitely indicated the contrary".

Due to a necessity for order and security, restrictions are particularly understandable, within the confines of a prison, especially a maximum security prison. This Court recognized that "...No romantic notions or sentimental view of constitutional rights or religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials". Sostre v. McGinnis, 334 F. 2d 906, 908 (2d Cir.) cert. den. 379 U.S. 892 (1964).

The fact that such restrictions on the free exercise of religion must be reasonable and for a valid purpose is not contested. Yet the free exercise of religion cannot be limitless.

Appellants claim that the full exercise of their religion is hindered in that they are not permitted to wear beards is a repetition of a meritless claim. As the District Court noted in its decision the constitutionality of this regulation has been upheld. Sekou v. Henderson, Docket No. 74-1187 (1974) affd. 495 F. 2d 1367 (2d Cir. 1974).

Appellants also claim violation of their rights in that they are not permitted to wear hats and are unable therefore to fully perform their prayer duties. Yet, appellants have wholly failed to allege that members of the Muslim religion thereby are being deprived of rights and privileges extended to other inmates and are being discriminated against in any way.

The prohibition against the wearing of hats at all times is applied to all inmates regardless of religion and is necessary for security in that weapons can be secreted under hats. However, inmates are permitted to wear hats during their religious services and prayers. The above rules are set forth in the Department of Correction regulations. *(AB #87 dated 11-17-72 now AB 4204, 11-22-75). These regulations are reasonable especially in a maximum security prison and have not been applied in a discriminatory manner.

* The Administrative Bulletins #87 and #4204 are attached hereto as Exhibit A.

Appellants further allege that they are not fully able to perform their prayer duties. But they have wholly failed to explain how defendants have prevented such performance. Appellants allege that they must pray five times a day at specified times; early morning, afternoon, late afternoon, early evening and late evening and in a prescribed manner; standing, bowing and prostrating (Complaint p. 4).

Appellants have not been prohibited from performing their prayers in the above prescribed manner and time. All New York State inmates including appellants are permitted to pray in their cells. (AB #87 dated 11-17-72). There is no prohibition as to standing, bowing or prostrating. Inmates are permitted group worship. In particular, appellants at Auburn States prison have Muslim religious services on Friday and Saturday of each week from one o'clock p.m. to three o'clock p.m.*

* A copy of the Auburn Correctional Facility Schedule of Religious Services for the different denominations is attached hereto as Exhibit B.

In addition, the prison schedule* reveals that inmates are confined in their cells until 7:30 a.m. They return to their cells at 11:15 a.m. or 11:30 a.m. and stay there until noon. Inmates then return to their cells at 3:00 p.m. and remain there until 3:30 p.m. At 4:15 p.m. inmates again return to the cell and have the option of staying there until the next morning or having yard privileges between 5:15 p.m. and 7:00 p.m. or between 7:00 p.m. and 8:30 p.m. In any event, after yard privileges the inmate returns to his cell and remains there until the next morning. It is patently beyond any plausible dispute that this schedule provides more than sufficient opportunity for appellants to perform their prayer duties in the manner prescribed and at the time prescribed.

Further, the regulation confining public prayer to either the cell or congregational worship is reasonable. This Court has recognized that "Neither provision [free exercise or freedom of speech] requires a state to permit persons to engage in public prayers in state owned facilities wherever and whenever they desire." Stein v. O'Shinsky, 348 F. 2d 999, 1001 (2d Cir.) cert. den. 382 U.S. 957 (1966).

* A copy of the Auburn Correctional Facility daily prison schedule is attached hereto as Exhibit C.

In the case of Bethew v. Daggett, 329 F. Supp. 796, 798 (ND Ga. 1970) affd 441 F. 2d 112(5th Cir. 1971) which is remarkably similar to the case at bar, an inmate who was of the Muslim faith, instituted a civil rights action claiming that he was not permitted to pray five times a day and was keeplocked for attempting to do so. The restriction on prayer, which this plaintiff disobeyed, was that public prayer must be performed in a prescribed area. The Court, in finding no violation in the free exercise of religion, found "...that the restrictions imposed are a necessary concomitant to the fact of incarceration."

Appellants make much of the fact that the regulations relied on by the District Court had been superseded. The District Court applied the proper case law and the superseding regulations were in essence the same as the ones cited.

The dismissal of this complaint was clearly proper since appellants have wholly failed to allege that they have been discriminated against. Further the Department of Correction regulations on the exercise of religion were valid, and there was no allegation of non-compliance with these regulations.

Finally appellants have failed to allege any viable
deprivation of their First Amendment rights.

CONCLUSION

THE DECISION OF THE DISTRICT
COURT SHOULD BE AFFIRMED.


Dated: New York, New York
March 15, 1976

Respectfully submitted,

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 <p>STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES</p> <p>DIRECTIVE</p>	<p>CLASSIFICATION</p> <p># 4204</p>	<p>DATE</p> <p>11/22/75</p>
<p>APPROVING AUTHORITY</p> <p><i>Wm. C. [Signature]</i></p>	<p>SUPERSEDES AB #87 dated 11/17/72</p> <p>DISTRIBUTION</p> <p>SUBJECT</p> <p>Religious Activities with Clergy</p>	

A. General

Resident Chaplains or Visiting clergy will be available to serve all inmates who request services of a religious nature. Consent for such services must be granted by the Superintendent.

B. Chaplains

1. Resident Chaplains

- a. The Department will provide Resident Chaplains to meet with every inmate who request such services.
- b. Spiritual assistance and counseling will be available to inmates who desire to deepen their knowledge, understanding and commitment to the tenets of a chosen faith.

2. Visiting Clergy

- a. The Superintendent and Resident Chaplain are responsible for granting approval to visiting clergymen who wish to conduct religious services for inmates.
- b. In order for visiting clergymen to officiate at religious services or provide spiritual advice to members of their faith, they must have denominational endorsement.
- c. Verification of a visiting clergyman's credentials is to be made prior to their initial visit to a facility.

3. Vestments, Medals and Religious Regalia

- a. During the conduct of religious services, clergymen may wear their religious vestments and/or insignia.
- b. Religious regalia which may present potential danger to the safety or security of the participants may not be used.
- c. Inmates may also be permitted to wear religious medals, or retain prayer rugs in their quarters.
- d. Muslims who wish to use the fez during religious services will be allowed to do so.


C. Areas Designated for Worship and Religious Study

1. The Senior Chaplain should consult with the Superintendent to provide a suitable area for scheduled worship services by religious groups.

EXHIBIT A

SUBJECT	CLASSIFICATION	DATE	PAGE
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2. Areas to be used for services or prayer should normally be reserved for a period of one to two hours duration.
3. The area should be large enough to accommodate the group and should have the necessary furnishings such as musical instruments, chairs, tables, lecterns and altars provided.

 <p>STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES</p> <p>DIRECTIVE</p>	<p>CLASSIFICATION #4203</p> <p>SUPERSEDES AB #87 dated 11/17/72</p>	<p>DATE 11/22/75</p> <p>DISTRIBUTION</p>
<p>APPROVING AUTHORITY</p> <p><i>Wm. C. [Signature]</i></p>	<p>SUBJECT</p> <p>Religious Activities for Inmates</p>	

A. General

Ministers, priests, rabbis or other authorized religious leaders of any faith may visit a facility to conduct services or provide religious counseling to inmates upon prior approval from the Superintendent and Senior Chaplain.

1. Religious Celebrations

- a. The Division of Ministerial Services will notify the Superintendent and Senior Chaplain of the dates observed by recognized religions as religious celebrations. (See Directive #4020).
- b. Prior to a religious celebration, which may involve a sacramental observance or special fast, the Senior Chaplain should consult with the Superintendent, religious leader(s) concerned and the Inmate Religious Leader(s) to finalize the arrangements in accordance with the safety and security procedures at the facility.

2. Religious Study

- a. Inmates may be allowed to meet informally for religious study as a group with staff supervision responsible for security present. The Senior Chaplain will obtain the necessary approvals for the inmates from the Superintendent.
- b. Inmates who desire to learn about religious practices of another faith may do so after consultation with the Senior Chaplain who will determine when their attendance can be accommodated at a service or study session.
- c. Participation in a religious celebration or service by an inmate is voluntary.

3. Individual Prayer or Devotions

- a. Inmates will be allowed to pray only in the privacy of their living quarters, during a religious service or in an area of the facility that has been designated for religious worship.

EXHIBIT A

SUBJECT	CLASSIFICATION	DATE	PAGE 2 OF 2
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B. Religious Publications and Texts

1. Inmates may subscribe to any religious publication approved by the Media Review Committee.
2. In the event an individual issue or publication does not appear to conform to departmental guidelines governing the acceptability of literature, it should be referred to the departmental Media Review Committee, who then seeks appropriate guidance from the Division of Ministerial Services.
3. Inmates are permitted scriptural or devotional books associated with their faith in their quarters. These books or publications are subject to the rules of acceptable literature issued by the Commissioner. Texts such as the Holy Bible, the Torah, and the Muslim's Holy Koran as well as the Six Books of Traditions, are permitted. The quantity of literature an inmate may possess in his quarters is subject to available space as well as safety and security factors.

C. Dietary Considerations

1. Inmates may refrain from eating those food items served to the general population which are contrary to their religious beliefs.
2. Orthodox Muslims and Jewish inmates are to be provided with some food that is wholly free of pork and pork products at each meal. (See Directive #3007).

D. Worship Modifications

1. The Superintendent and Senior Chaplain may discuss with the Inmate Liaison Committee problems and suggestions relative to the conduct, organization and supervision of religious services.
2. Any problems will be resolved by the Superintendent after consultation with the Senior Chaplain.



STATE OF NEW YORK

DEPARTMENT OF CORRECTIONAL SERVICES

THE STATE OFFICE BUILDING CAMPUS

ALBANY, N. Y. 12226

November 17, 1972

RUSSELL G. OSWALD
COMMISSIONER

*Supplemented by
N.Y.S. Supreme Court
decision re:
of Elijah Muhammad
12/2/72*

ADMINISTRATIVE BULLETIN #87

TO: SUPERINTENDENTS OF CORRECTIONAL FACILITIES, GROUP AND
DIVISION HEADS, DIRECTOR OF STATE HOSPITALS AND CAMPS,
DIRECTORS AND SUPERVISORS OF PAROLE FIELD AND INSTITU-
TIONAL OFFICES

FROM: RUSSELL G. OSWALD, COMMISSIONER *Russell G. Oswald*

RE: POLICY GUIDELINES RELATING TO RELIGIOUS SERVICES AND
ACTIVITIES FOR INMATES

In the interest of promoting the maximum opportunity for inmates to participate in the services and ministrations of their religious faiths in such a manner and at such times and occasions as may be appropriate to their denominational requirements, the Department herein specifies guidelines for the conduct of religious services in the various facilities, camps, institutions, and State Hospitals.

It is an objective of the New York State Department of Correctional Services to extend to committed offenders for their spiritual welfare as much freedom and opportunity for religious practice as is practicable.

It is declared the policy of the Department that worship services, religious activities, and meetings of a religious nature within the facility shall be made available to those offenders who wish to participate.

The performance of religious activities and services in the facility shall take place within the requirements of security, safety, and orderly conditions. Therefore, such services include the involvement of the chaplains, rehabilitative and security staff, as well as guest clergy.

EXHIBIT A

1. The Superintendent shall have the responsibility to supervise arrangements for the locus of religious services. There shall be appropriate staff supervision of attendance at any worship service, religious activity or meeting of a religious nature. Such supervision may include observation by facility employees or chaplains who are assigned for such purpose by the Superintendent.
2. Resident chaplains will be available to serve all inmates in the facility who request such services. Assistance shall be provided to deepen and expand knowledge, understanding, and commitment to the beliefs and principles of the religion of choice.
3. Outside clergy who have received ecclesiastical endorsement from their religious authority or recognized denominational agency shall be permitted to officiate at religious services for a duly recognized denominational group and may render spiritual advice and ministrations to members of such religious faith. Consent for such services and ministrations must be granted by the Superintendent. Arrangements for these religious activities shall be under the supervision of the Superintendent and the resident chaplains, after consultation with appropriate guest clergy.

RULES GOVERNING RELIGIOUS ACTIVITIES

In keeping with the objective of providing ample opportunity to resident inmates for participation in religious activities, the following rules are set forth to guide the administration of religious programs. These rules are consistent with recent court decisions relating to religious services for inmates.

1. Muslims, Catholics, Jews, Protestants, and other bonafide religious bodies shall have equal rights and privileges in the exercise of their respective religions. Ministers, priests, and rabbis of all faiths, subject to the provisions of No. 3 above, may attend the facility for the purpose of officiating at religious services

and for the purpose of offering individual religious ministrations.

2. Verification of the visiting clergyman's stature shall be obtained prior to initial visit to the facility.
3. Clergymen may wear such religious raiment as their faith requires and inmates may wear such religious insignia which, in the reasonable judgment of the Superintendent, will not incite an inmate disturbance or present a danger to the safety and security of both inmates and employees.
4. Inmates adhering to religious faiths may be permitted to wear or use religious medals, or comparable insignia, prayer rugs and other regalia having religious symbolism, provided the use of such items or symbols does not create disciplinary, security or safety problems. Muslims who wish to use the qaz for worship will be allowed to do so.
5. Subject to approval of the Superintendent, inmates who wish to learn about the religious practice of any religion may attend services at the time and place appointed by the Superintendent for such purpose, subject to reasonable restrictions as to space and facility security. Inmates who have not attained the age of eighteen shall receive the consent of their parents prior to attending the service of a religion other than their own.
6. Muslim inmates shall be provided whenever possible with meals that are wholly free of pork and pork products, and when that is not practicable, there shall be available at each meal some food free of those substances. (You are referred to Administrative Bulletin #2, dated March 21, 1972, for further guidance on this matter.) Likewise, other inmates may abstain from eating those food items served to the general population which are prohibited by the religion of their choice.

7. Inmates may subscribe to any religious publication they wish, but such publication shall be subject to review by the proper authority, including the exclusion of those issues which violate established Departmental guidelines governing the acceptability of literature for inmates; see Administrative Bulletin #60, dated May 30, 1972, for further guidance.
8. Inmates will be permitted to retain in their living quarters for personal use those Scriptural or devotional books which are canonical or traditional to the religion of their choice. All books and publications must be in compliance with the rules of acceptable literature as set forth by the Commissioner. For example, such works as the Holy Bible, the Torah, and the Muslim's Holy Koran together with the Six Books of Traditions shall be permitted. The number of religious books allowed within inmate quarters shall be subject to available space as well as such safety factors as fire prevention and proper sanitation.
9. Inmates will be allowed to pray according to the dictates of their religion only within the privacy of their living quarters or during religious services, and only within other areas which have been set aside for the purpose of religious worship.
10. Participation in religious activities and attendance at religious services is voluntary.
11. Inmates and residents may change the designation of their religious preference or affiliation, but such a decision should be made only after a period of time which will enable thorough consideration of the implications of the decision. Such a change may be made after consulting with the appropriate facility chaplain or the Superintendent in the absence of a facility chaplain. Inmates who have not attained the age of eighteen shall receive the permission of their parents prior to changing the designation of their religious preference.

12. In order to accommodate special religious celebrations, including sacramental observances, special fasts and the like, the Superintendent should consult the facility chaplains, the Inmate Liaison Committee, and guest clergy to anticipate and arrange for opportunities for the celebration of those observances which are appropriate to a given religious faith. All such arrangements shall be in keeping with the safe and orderly conduct of the facility. The Office of the Commissioner shall assist by notifying the Superintendents of special religious celebrations.
13. Upon request, inmates may be allowed to meet together and participate in religious group study under appropriate staff supervision. The decision to allow such informal study shall be left to the judgment of the Superintendent, who shall consider the recommendation of the facility chaplain.
14. The Superintendent and the facility chaplain may discuss with the Inmate Liaison Committee problems and suggestions which arise out of the conduct, organization, and supervision of religious services. In arriving at a determination regarding the solution of such problems the Superintendent shall consult with the chaplain and make the final decision.

GUIDELINES FOR THE CONDUCT OF RELIGIOUS SERVICES

1. The Superintendent shall provide a suitable place for religious worship by each religious group so requesting on a scheduled basis in accordance with the tenets of the religious body. A period of one to two hours for organized services and prayers will be generally considered appropriate.
2. The space should be large enough to accommodate the membership of the group; arrangements will be made to provide the necessary furnishings such as chairs and tables, etc., so that the services may be conducted in a pleasant atmosphere, and with the necessary implements.

3. Officer observation and supervision during the services are appropriate; such supervision will not interfere with the prayers or services, but will serve to insure the safety and security of the facility.
4. In cases where inmates, because of genuine religious differences, cannot accept the ministrations of the facility chaplain, efforts shall be made upon request to locate appropriate clergy from outside the facility.
5. Religious faiths which teach as an integral part of their doctrine that members in good standing are authorized to officiate as ministers, may conduct their own prayer meeting and services in the absence of an approved visiting clergyman or minister.

The facility chaplain and the appropriate guest clergy shall be consulted regarding a mature inmate who is capable of conducting the services in the absence of a visiting clergyman.

SPECIAL PACKAGES - RELIGIOUS HOLIDAYS - RAMADAN

Inmates may receive special packages of foodstuff, in keeping with authorized items and established weight limits on special religious holidays such as Christmas, Easter and Rosh Hashana. All inmates, regardless of their religious affiliation, may receive special packages on these occasions. Such packages should be scheduled to arrive at the facility approximately one week before or one week after the day of the Feast following the end of Fasting, which is the first day following the end of Ramadan. (With reference to the Orthodox Muslims, this date will fluctuate each year because this group uses the lunar calendar. Notice regarding the exact date of the Orthodox Feast of Ramadan will be given as needed by the Office of the Commissioner.)

Black Muslims: For the Black Muslim Feast of Ramadan which occurs on December 31 of each year, the special holiday packages Black Muslim inmates would normally receive at Christmas time may be scheduled to arrive at the facility within a period of approximating one week before and one week after December 31, which is the Black Muslim day for celebrating the Feast following the end of the Fast.

This policy does not authorize any extra holiday packages for Black Muslims; no inmate will receive holiday packages which exceed the established weight limits for the month of December,

or any other time set aside for the receipt of such packages.

DIRECTIVES AFFECTED

This Bulletin cancels and supplants those provisions contained in the memorandums of February 17, 1972, "National Holiday, Followers of Elijah Muhammad - February 26"; and, of February 23, 1972, "Savior's Day - February 26", which authorizes receipt of a holiday package in recognition of such date as the Black Muslim Savior's Day. Hereafter, no special package will be allowed due to the recognition of Ramadan as the proper time for the receipt of such package.

In addition, the following directives are canceled and superseded by this Bulletin:

1. Memorandum of November 1, 1971, "Ramadan, Islamic Sacred Month".
2. Memorandum of December 1, 1971, "Ramadan, Islamic Sacred Month".
3. Administrative Memorandum #53, dated April 9, 1969, "Religious Practices in Correctional Institutions".
4. McGinnis Memorandum of November 16, 1967, rules relating to the practice of Muslimism (Islam) in the State's correctional facilities.

DISSEMINATION OF INFORMATION

Appropriate dissemination of the rules and procedures contained herein shall be made for the guidance of staff, visitors, and inmates. Copies of this Bulletin shall be posted on bulletin boards throughout the facility whereby employees, inmates, and the public may be informed of the policy herein prescribed.

rf

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Joan P Scannell, being duly sworn, deposes and says that she is ~~employed~~ in the office of the Attorney General of the State of New York, attorney for ~~defendants~~ herein. On the 15 day of March, 1976, he served the annexed upon the following named person :

Michael Mushlin
The Legal Aid Society
Prisoners Rights Project
15 Park Row
NY 10038

~~Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by _____ for that purpose.~~

Sworn to before me this
15 day of March, 1976

Michael P. Dogarty
Assistant Attorney General
of the State of New York

Joan P Scannell

